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CLIENT ALERT: New York State and New York City Impose New Sexual Harassment-Related Obligations on Employers – By Jeffrey S. Siegel and Damien M. DiGiovanni

Both the State of New York and New York City recently enacted new legislation aimed at reducing and addressing sexual harassment in the workplace. There are staggered effective dates for various components of the new laws. The significant highlights, and the dates they become effective, are listed below.

New York State Law

Effective Immediately

Expansion of Protections to Non-Employees – The New York State Human Rights Law has been expanded by adding Section 296-D, which adds protection against sexual harassment to non-employees (*i.e.*, contractors, vendors, or consultants), if an employer either knows or should have known that an individual was being subjected to sexual harassment in the workplace, but fails to take corrective action.

Effective July 11, 2018

Prohibition of Non-Disclosure Agreements in Settlement Agreements – The law adds Section 5-336 to the General Obligations Law, and Section 5003-b to the Civil Practice Law and Rules ("CPLR"), and provides that settlement agreements for claims involving sexual harassment can no longer include a non-disclosure provision *unless* the provision of confidentiality is the complainant's preference. The complainant is afforded 21 days to consider the confidentiality condition. If he or she chooses to include the condition, it must be provided and agreed to by all parties. The complainant will then have an additional seven days to revoke the agreement. These clauses appear to apply to all claims of sexual harassment, and not just those filed in court.

Prohibition of Arbitration Clauses for Sexual Harassment Claims – The new law, which adds Section 7515 to the CPLR, prohibits agreements between the employer and employees that requires employees to arbitrate claims of sexual harassment, "except where inconsistent with federal law," and invalidates clauses in existing contracts that mandate arbitration of sexual harassment claims. (We anticipate that this clause will be vulnerable to a legal challenge based on preemption by the Federal Arbitration Act. It may take years, however, to be sorted out by litigation.)

Effective October 9, 2018

Mandatory Policy and Training – The new law adds Section 201-g to the Labor law and requires the New York Department of Labor and Division of Human Rights to collaborate in developing a model

sexual harassment prevention policy and a model sexual harassment prevention training program that all New York employers will be required to adopt or, alternatively, employers must establish their own policy and training program that meets or exceeds the state's requirements. The policy must be distributed in writing to employees and the sexual harassment training must be provided to all employees on an annual basis, at a minimum. The model sexual harassment policy must include, among other information, examples of prohibited conduct; state and federal laws concerning sexual harassment and the remedies available to victims; a standard complaint form; a procedure for investigating complaints; information for employees regarding their rights and all available forums for adjudicating complaints; and, an anti-retaliation provision. The training must be interactive and cover several topics including the following: an explanation of sexual harassment and examples of unlawful conduct; the state and federal laws concerning sexual harassment and the remedies available to victims; conduct and responsibilities of supervisors; and, employees' rights and available forums for adjudicating complaints.

Effective January 1, 2019

Certification by Bidders for State Contracts – An amendment to the State Finance Law requires an employer bidding for state contracts to include a certification, under penalty of perjury, that it maintains a written sexual harassment policy and that it similarly provides annual sexual harassment prevention training to all of its employees. Bids submitted without the certification will not be considered, but the new law allows the bidder to provide an explanation for its failure to provide the certification. Where competitive bidding is not required, the certification requirement is at the discretion of the state department, agency or official to which the bid is submitted.

New York City Law

Effective Immediately

Statute of Limitations Expansion – The law expands the statute of limitations for bringing sexual harassment claims from one year to three years, under the New York City Human Rights Law (Section 8-109 of the administrative code of the city of New York). The statute of limitations for claims other than gender-based harassment remains at one year.

Smaller Employers Covered – All employers, regardless of size, are now subject to sexual harassment claims, through an amendment to Section 8-102 of the administrative code of the city of New York. Claims other than sexual harassment may only be brought against employers with four or more employees.

Effective September 6, 2018

Poster and Information Sheet Requirement – The new law amends Section 8-107 of the administrative code of the city of New York to require employers to display an anti-sexual harassment rights and responsibilities poster in locations frequented by employees (e.g., break rooms or other common areas). The poster, which must be in both English and Spanish, will be created and approved by the City and will be available online. Employers must also issue an information sheet regarding

sexual harassment, also to be designed by the City, to all new hires, with an option to include the required information in a handbook issued to all new hires.

Effective April 1, 2019

Training – The new law amends Section 8-107 of the administrative code of the city of New York and will require employers with 15 or more employees to conduct annual, interactive sexual harassment training for all employees employed in New York City. The New York City Commission on Human Rights is responsible for creating and posting an interactive training module on its website. The statute defines "interactive" to mean "participatory teaching whereby the trainee is engaged in a trainer-trainee interaction, use of audio-visuals, computer or online training program or other participatory forms of training as determined by the commission."

Impact

Employers covered by the new laws should review their existing policies concerning sexual harassment and training and determine whether additional steps are needed to comply. Employers should also modify settlement agreement forms to comply with the new requirements. Lastly, while training is highly recommended for all employers, those who have employees in New York City should ensure that their employees receive appropriate, interactive training on sexual harassment. MBJ attorneys are available to discuss our training programs and answer any other questions about these new laws.

Jeffrey S. Siegel and Damien M. DiGiovanni are attorneys with Morgan, Brown & Joy, LLP, and may be reached jsiegel@morgnbrown.com or ddigiovanni@morganbrown.com, and (617) 523-6666. Morgan, Brown & Joy, LLP focuses exclusively on representing employers in employment and labor matters.

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